

11 USC § 544
ORS 95.230
Fraudulent Transfer
Fraud

Mitchell v. Burt & Gordon Civ. No. 93-438-FR (Adv. No. 92-3112)

In re Stein Case No. 392-33885-S7

11/10/93

J. Frye

The district court granted defendants' motions for summary judgment, and entered judgment against the trustee. The chapter 7 trustee sued the debtor's former lawyers to recover the \$1.2 million proceeds from the sale of stock. The debtor had pledged the stock to the defendants prepetition for their fees. The defendants purchased the stock at a sheriff's sale conducted in their office by bidding \$5,000 of a \$54,000 judgment for fees they held against the debtor.

The trustee asserted five theories, including fraudulent transfer, breach of fiduciary duty, misrepresentation and fraud, tortious breach of good faith. The court granted judgment on all theories.

The court relied on an Oregon decision to hold that the transfer of stock to a lawyer to secure payment for future legal services is not a fraudulent transfer. The court also determined there was no evidence to support the other claims.

The claim to set aside the state court judgment and sheriff's sale had to be pursued in the state court.

U.S. BANKRUPTCY COURT
DISTRICT OF OREGON
FILED

NOV 10 1993

TERENCE H. DUNN, CLERK

BY WK DEPUTY

IN THE UNITED STATES DISTRICT COURT 92-3112
FOR THE DISTRICT OF OREGON

JOHN MITCHELL, Trustee,

Plaintiff,

v.

BURT & GORDON, P.C. an Oregon
Professional Corporation,
et al.,

Defendants.

Civil No. 93-438-FR

O P I N I O N

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FRYE, Judge:

7 The matters before the court are 1) the motion of defen-
8 dants Burt & Vetterlein, P.C., Robert G. Burt, and Andrea L.
9 Bushnell for summary judgment (#144); and 2) the motion of
10 defendant Mark A. Gordon for summary judgment (#145).

11 BACKGROUND

12 This is an adversary proceeding in which the trustee
13 seeks to recover alleged property of the bankruptcy estate
14 of the debtor, Alexander V. Stein, from the possession of the
15 defendants, attorneys who represented Stein. The trustee
16 alleges five claims for relief: 1) avoidance of fraudulent
17 transfer under O.R.S. 95.200 et seq. and 11 U.S.C. § 544(b);
18 2) breach of fiduciary duty; 3) misrepresentation and fraud;
19 4) tortious breach of good faith and fair dealing; and 5) to
20 vacate judgment and set aside sheriff's sale.

21 UNDISPUTED FACTS

22 Alexander V. Stein was a client of the law firm of Burt
23 & Gordon, P.C. (now known as Burt & Vetterlein, P.C.) from
24 sometime in 1986 until September, 1989. Defendant Mark A.
25 Gordon was the attorney in the firm who handled most of the
26 legal matters for Stein.

1 On March 18, 1988, Stein agreed, on behalf of himself,
2 AVS Research, Inc., and AVS Capital Fund, Ltd., with the
3 Corporate Securities Section of the Division of Finance
4 and Corporate Securities of the Department of Insurance
5 and Finance of the State of Oregon to the entry of a cease
6 and desist order. At that time, Stein represented that he
7 owed investors approximately thirty-two million dollars as
8 of May 10, 1988.

9 On June 8, 1988, Stein entered into a written fee agree-
10 ment with the law firm of Burt & Gordon, P.C., whereby Burt
11 & Gordon, P.C. would provide legal services to him and his
12 businesses.

13 In July, 1988, Nathan Levin and James Vick paid a
14 retainer of \$20,000 to the law firm of Burt & Gordon, P.C.
15 on behalf of Stein. Thereafter, Stein failed to make the
16 payments required under the fee agreement with Burt & Gordon,
17 P.C.

18 On August 10, 1988, Stein paid \$572,000 for the stock in
19 In Focus Systems, Inc., an Oregon corporation. This stock is
20 the stock involved in this case.

21 On September 16, 1988, Stein delivered to the law firm
22 of Burt & Gordon, P.C. Stock Certificate No. 6, representing
23 71,500 shares of common stock in In Focus Systems, Inc. in
24 order to secure the continued legal services of the law firm
25 of Burt & Gordon, P.C. On that same day, Mark Gordon, on
26 ///

1 behalf of Burt & Gordon, P.C., sent a letter to Stein which
2 stated, in part:

3 This is to confirm our understanding and agree-
4 ment with respect to your assignment of your In
5 Focus Systems, Inc., Stock Certificate No. 6 to Burt
& Gordon, P.C..

6 Your assignment is for the purpose of paying
7 all outstanding fees, costs, and advances due to
8 Burt & Gordon, P.C., by you, AVS Research, Inc.,
9 and AVS Capital Fund, Ltd., under our Client Matter
10 No. 5390 or otherwise, either now or in the future
11 (hereinafter referred to as "Obligations"). It
12 is not a pledge of the stock, nor a transfer of a
13 security interest in the stock. The stock will be
14 returned to you upon full payment of the Obliga-
15 tions. If, however, such Obligations are not paid
within 30 days of our formal, written demand there-
for, Burt & Gordon, P.C., shall be free to sell the
stock to satisfy the Obligations upon any terms it,
in the exercise of its sole discretion, and with no
obligation to you to obtain a "best price" or other-
wise look after your interests, deems appropriate.
Any funds received by Burt & Gordon, P.C., in excess
of the Obligations (including Burt & Gordon, P.C.'s
costs in selling the stock, if any), shall be
returned to you.

16 Please acknowledge your agreement with the fore-
17 going, as well as your receipt of my recommendation
18 that you consult separate legal counsel, prior to
assigning the stock to Burt & Gordon, P.C., by sign-
ing and returning the enclosed copy of this letter.

19 Exhibit 2 to Affidavit of Mark A. Gordon.

20 On December 20, 1988, Mark Gordon, on behalf of the law
21 firm of Burt & Gordon, P.C., wrote to Stein to inform him that
22 a transfer notice would be sent to In Focus Systems, Inc. pur-
23 suant to the letter of agreement of September 16, 1988 trans-
24 ferring the shares of stock from Stein to Burt & Gordon, P.C.
25 unless the sum of \$20,000 was deposited with the firm by the
26 close of the business day.

PAGE 4 - OPINION

1 On August 30, 1989, Stein delivered to the law firm of
2 Burt & Gordon, P.C. additional security in the form of the
3 Premium Companies stock. Stein assigned the Premium Companies
4 stock to Burt & Gordon, P.C. for the purpose of paying all
5 outstanding fees, costs and advances due to Burt & Gordon,
6 P.C. The letter of assignment provided by Burt & Gordon, P.C.
7 stated, as did the letter of agreement of September 16, 1988,
8 that the stock would be returned upon full payment of the debt
9 owing and could be sold with thirty days written notice, with
10 any excess funds from the sale returned to Stein.

11 On August 31, 1989, defendant Andrea L. Bushnell, on
12 behalf of the law firm of Burt & Gordon, P.C., wrote to Stein
13 stating that the demand to pay was made more than thirty days
14 prior. Bushnell informed Stein that there was no known market
15 available in which to liquidate the stock certificates, but
16 that Burt & Gordon, P.C. reserved the right to sell the stock
17 certificates to any purchaser, regardless of whether the sale
18 satisfied commercially reasonable standards and regardless of
19 the loss Stein might ultimately suffer because of the sale.

20 Stein continued to be delinquent in his payments.

21 On September 25, 1989, Stein signed a Confession of Judg-
22 ment in favor of the law firm of Burt & Gordon, P.C. "for the
23 sum of Fifty Four Thousand, Nine Hundred Thirty Six and 23/100
24 Dollars (\$54,936.23), together with interest thereon at the
25 rate of twelve percent (12%) per annum from the date hereof
26 until paid." Pretrial Order, para. 3(f), p. 3. At that same

1 time, the law firm of Burt & Gordon, P.C. resigned as Stein's
2 attorneys. At the request of Stein, Burt & Gordon, P.C. waited
3 ten days before docketing the judgment against Stein in order
4 to allow Stein an opportunity to locate funds to bring his
5 account current.

6 On October 4, 1989, the Confession of Judgment was filed,
7 and a Judgment was entered against Stein and in favor of the
8 law firm of Burt & Gordon, P.C. for the sum of \$54,936.23.

9 On October 11, 1989, the law firm of Burt & Gordon, P.C.
10 issued a Writ of Garnishment on itself.

11 On October 12, 1989, the law firm of Burt & Gordon, P.C.
12 executed a Certificate of Garnishee.

13 On October 31, 1989, a sheriff's sale was conducted in
14 the offices of the law firm of Burt & Gordon, P.C. Burt &
15 Gordon, P.C. was the only bidder to appear at the sheriff's
16 sale on October 31, 1989. The stock in In Focus Systems, Inc.
17 was purchased by Burt & Gordon, P.C. for \$5,000.

18 On November 16, 1989, a sheriff's sale was conducted in
19 the offices of the law firm of Burt & Gordon, P.C., at which
20 time the Premium Companies stock was purchased by Burt &
21 Gordon, P.C. for \$1,000.

22 Until November 20, 1989, Mark Gordon owned one share of
23 the stock in Burt & Gordon, P.C. On November 20, 1989, Gordon
24 withdrew from the firm, and on the following day, Vetterlein
25 and Bushnell became shareholders, and the name of the law firm
26 was changed to Burt, Vetterlein & Bushnell, P.C.

1 Sometime in January, 1990, the law firm of Burt, Vetter-
2 lein & Bushnell, P.C. attempted to obtain a replacement stock
3 certificate for the stock in In Focus Systems, Inc.

4 On June 21, 1990, Stock Certificate No. 9 (dated June 15,
5 1990 and representing 71,500 shares of stock in In Focus
6 Systems, Inc.) was issued to the law firm of Burt, Vetterlein
7 & Bushnell, P.C.

8 On or about September, 1990, In Focus Systems, Inc.
9 declared a 1 for 1 stock dividend and issued to the law firm
10 of Burt, Vetterlein & Bushnell, P.C. a stock certificate for
11 an additional 71,500 shares of stock in In Focus Systems, Inc.
12 The total number of shares owned by Burt, Vetterlein & Bush-
13 nell, P.C. in In Focus Systems, Inc. was now 143,000.

14 On December 28, 1990, the stock held by the law firm of
15 Burt, Vetterlein & Bushnell, P.C. in In Focus Systems, Inc.
16 was sold in a public offering for \$1,350,000. First Inter-
17 state Bank of Oregon was the escrow agent for the public
18 offering, and after deduction of costs, the net proceeds were
19 \$1,262,690.

20 The net proceeds from the sale of the stock in In Focus
21 Systems, Inc. have been interplead into the registry of the
22 Circuit Court of the State of Oregon for the County of Mult-
23 nomah. Gordon makes no claim to these funds.

24 On May 31, 1991, AVS Capital Fund, Ltd. filed a Chapter
25 11 petition in bankruptcy.

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1 On July 15, 1991, Stein filed a Chapter 11 petition in
2 bankruptcy.

3 In June, 1992, Bushnell withdrew from the law firm of
4 Burt, Vetterlein & Bushnell, P.C., and the name of the firm
5 was changed to Burt & Vetterlein, P.C.

6 On April 30, 1992, Stein was indicted in this court for
7 the crimes of mail fraud, wire fraud, securities fraud, and
8 money laundering. On May 20, 1993, Stein was convicted by
9 a jury, and on August 23, 1993, he was sentenced to prison.
10 Stein has asserted, and continues to assert, the Fifth Amend-
11 ment as a defense when queried about issues relating to the
12 events that are the subject of this action.

13 APPLICABLE STANDARD

14 Summary judgment is appropriate where "there is no genu-
15 ine issue as to any material fact and . . . the moving party
16 is entitled to a judgment as a matter of law." Fed. R. Civ.
17 P. 56(c). The initial burden is on the moving party to point
18 out the absence of any genuine issue of material fact.

19 Once the initial burden of the moving party is satisfied,
20 the burden shifts to the opponent to demonstrate through the
21 production of probative evidence that there remains an issue
22 of fact to be tried. Celotex Corp. v. Catrett, 477 U.S. 317,
23 323 (1986). The non-moving party must make a sufficient
24 showing on all essential elements of the case with respect
25 to which the non-moving party has the burden of proof. Id.

26 The decision faced by the court is essentially the same

1 decision faced by a court on a motion for a directed verdict
2 -- that is, whether the evidence on the motion for summary
3 judgment presents a sufficient disagreement to require submis-
4 sion to a jury, or whether it is so one-sided that one party
5 must prevail as a matter of law. Anderson v. Liberty Lobby,
6 Inc., 477 U.S. 242, 251 (1986). If reasonable minds could
7 differ as to the conclusions drawn from the evidence in the
8 record, the motion for summary judgment should be denied. Id.

9 ANALYSIS

10 Defendants, Burt & Vetterlein, P.C., Robert G. Burt, and
11 Andrea L. Bushnell (hereinafter, Burt & Vetterlein) and Mark
12 A. Gordon, assert that they are entitled to summary judgment
13 dismissing each of the trustee's five claims for relief.

14 Initially, Burt & Vetterlein contend that AVS Capital
15 Fund, Ltd. cannot claim the Interpleader Funds or the stock in
16 In Focus Systems, Inc. through the trustee because there has
17 never been any evidence produced that AVS Capital Fund, Ltd.
18 ever had legal or equitable title to the In Focus Systems,
19 Inc. stock or to the Premium Companies stock.

20 There is no evidence in the record that AVS Capital
21 Fund, Ltd. ever had legal or equitable title to the In Focus
22 Systems, Inc. stock or the Premium Companies stock. Any claim
23 asserted on behalf of AVS Capital Fund, Ltd. as to the Inter-
24 pleader Funds is dismissed.

25 The individual defendants assert that while the profes-
26 sional corporations may be liable, they are not.

1 O.R.S. 58.185(2) states, in relevant part:

2 A shareholder of a professional corporation may
3 be held:

4

5 (c) Jointly and severally liable with all of
6 the other shareholders of the corporation for the
7 negligent or wrongful acts or misconduct committed
8 by any shareholder, or by a person under the direct
supervision and control of any shareholder in the
rendering of professional services on behalf of the
corporation to a person receiving the service.

9 The acts alleged to have been committed by the individual
10 defendants are within the definition of "negligent or wrongful
11 acts or misconduct." The individual defendants assert that
12 collection services at issue in this case are not "profes-
13 sional services" in that anyone can do them without being
14 licensed. However, the payment for the "services" rendered
15 by the defendants was provided for in the fee agreement and
16 billed on the billing statements as professional services
17 rendered. The acts at issue in this case were rendered and
18 billed as professional services.

19 1. First Claim for Relief - Fraudulent Transfer

20 Burt & Vetterlein contend that they are entitled to an
21 order of summary judgment on the trustee's first claim for
22 relief for fraudulent transfer because 1) seven of the eight
23 alleged transfers were not transfers within the meaning of
24 O.R.S. Chapter 95; 2) there is no evidence that any transfer
25 was made by Stein with the "actual intent to hinder, delay,
26 or defraud" as required by O.R.S. 95.230 (1)(a); 3) as a

1 matter of law, Stein received "a reasonably equivalent value
2 in exchange for the transfer[s]" (O.R.S. 95.230(1)(b)); and
3 4) the transfers were received by Burt & Vetterlein in good
4 faith, and Stein received the reasonably equivalent value of
5 the stock. See O.R.S. 95.270(1).

6 In any case, Burt & Vetterlein argue that the trustee
7 would not be entitled to punitive damages or attorney fees
8 under Chapter 95.

9 Gordon contends that he is entitled to summary judgment
10 on the trustee's first claim for relief for fraudulent trans-
11 fer on the grounds that he was not a transferee of the stock.

12 The trustee contends that the transfer of the shares of
13 stock from Stein to the law firm of Burt & Gordon, P.C. has
14 all of the badges of fraud necessary to support a claim for
15 fraudulent transfer in that Stein paid \$572,000 for the shares
16 and owed less than \$20,000 to Burt & Gordon, P.C. when he
17 transferred the shares to Burt & Gordon, P.C. The trustee
18 contends that since Stein owed thirty-two million dollars to
19 various creditors at the time of the transfer of the stock,
20 the transfer was made in anticipation of the filing of various
21 lawsuits. The trustee asserts that there are facts from which
22 a finder of fact could conclude that the transfer depleted
23 Stein of his only substantial assets and was for the purpose
24 of defrauding his creditors.

25 The trustee further argues that the question of whether
26 or not the law firm of Burt & Gordon, P.C. received the stock

1 in good faith is for the jury to decide, and that there are
2 facts from which a jury could conclude that the actions taken
3 were not in good faith in light of the knowledge that Burt
4 & Gordon, P.C. had of Stein's legal and financial problems.

5 O.R.S. 95.230 states:

6 (1) A transfer made or obligation incurred by
7 a debtor is fraudulent as to a creditor, whether the
8 creditor's claim arose before or after the transfer
9 was made or the obligation was incurred, if the deb-
10 tor made the transfer or incurred the obligation:

11 (a) With actual intent to hinder, delay, or
12 defraud any creditor of the debtor; or

13 (b) Without receiving a reasonably equivalent
14 value in exchange for the transfer or obligation,
15 and the debtor:

16 (A) Was engaged or was about to engage in a
17 business or a transaction for which the remaining
18 assets of the debtor were unreasonably small in
19 relation to the business or transaction; or

20 (B) Intended to incur, or believed or rea-
21 sonably should have believed that the debtor would
22 incur, debts beyond the debtor's ability to pay as
23 they become due.

24 (2) In determining actual intent under para-
25 graph (a) of subsection (1) of this section, con-
26 sideration may be given, among other factors, to
whether:

(a) The transfer or obligation was to an insi-
der;

(b) The debtor had retained possession or
control of the property transferred after the trans-
fer;

(c) The transfer or obligation was disclosed
or concealed;

(d) Before the transfer was made or obligation
was incurred, the debtor was sued or threatened with
suit;

1 (e) The transfer was of substantially all the
2 debtor's assets;

3 (f) The debtor had absconded;

4 (g) The debtor had removed or concealed assets;

5 (h) The value of the consideration received by
6 the debtor was reasonably equivalent to the value of
7 the asset transferred or the amount of the obliga-
8 tion incurred;

9 (i) The debtor was insolvent or became insol-
10 vent shortly after the transfer was made or the
11 obligation was incurred;

12 (j) The transfer had occurred shortly before
13 or shortly after a substantial debt was incurred;
14 and

15 (k) The debtor had transferred the essential
16 assets of the business to a lienor who had trans-
17 ferred the assets to an insider of the debtor.
18

19 O.R.S. 95.240(2) provides that:

20 A transfer made by a debtor is fraudulent as
21 to a creditor whose claim arose before the transfer
22 was made if the transfer was made to an insider for
23 other than a present, reasonably equivalent value,
24 the debtor was insolvent at that time and the insi-
25 der had reasonable cause to believe that the debtor
26 was insolvent.

O.R.S. 95.270(1) provides that:

A transfer or obligation is not voidable under
ORS 95.230(1)(a) as against a person who took in
good faith and for a reasonably equivalent value or
any subsequent transferee or obligee.

A claim for fraudulent transfer cannot be successful
if the security interest in the stock was transferred for
"reasonably equivalent value" within the meaning of O.R.S.
95.230(1)(b) and O.R.S. 95.240(1) and (2).

1 In Nelson v. Hansen, 278 Or. 571, 565 P.2d 727 (1977).

2 the court stated:

3 [I]t is established in Oregon, as in most states,
4 that a debtor who is about to be sued in court may
5 transfer assets to his attorney in consideration of
6 future legal services in such litigation and that
7 such transfers will also be upheld against the
8 claims of other creditors when the purpose of the
9 transfer was not to defraud other creditors, where
10 the consideration was fair and adequate and no
11 benefit was reserved to the debtor. . . .

12 Indeed, a transfer is not necessarily invalid
13 as in fraud of creditors because it involves all of
14 the property of the grantor or because its effect is
15 to defeat the claims of other creditors.

16 In considering whether a transfer was made in
17 fraud of creditors it is also important to bear in
18 mind that if good consideration was given, there
19 must have been a fraudulent intent not only by the
20 grantor, but also by the grantee[,] and that the
21 existence of such a fraudulent intent is to be
22 determined as of the date of the transfer alleged
23 to be fraudulent.

24 278 Or. at 577-78 (citations omitted).

25 A debtor may prefer one creditor over another, provided
26 that the purpose of the transaction is not to defraud other
creditors; that there was fair and adequate consideration for
the transfer; and that there was no reservation to the debtor
of any benefit. 278 Or. at 577.

There is no dispute that Stein owed Burt & Vetterlein a
substantial amount of money in attorney fees from September,
1988 through the sheriff's sale in October, 1989. The only
evidence in the record is that the primary intent of Stein
in transferring the stock to Burt & Vetterlein, and the sole
intent of Burt & Vetterlein in accepting the stock transfer,

1 was to secure the payment of attorney fees. There is no evi-
2 dence in this case that Stein or Burt & Vetterlein intended
3 to defraud other creditors. There is no evidence that Burt
4 & Vetterlein took possession of the stock other than in good
5 faith and for the payment of their legal fees.

6 The court finds that all of the defendants are entitled
7 to summary judgment in their favor on the first claim for
8 relief for fraudulent transfer.

9 2. Second Claim for Relief - Breach of Fiduciary Duty

10 Burt & Vetterlein contend that they are entitled to an
11 order of summary judgment on the trustee's second claim for
12 relief for breach of fiduciary duty because 1) this claim
13 is barred by the applicable two-year statute of limitations;
14 2) there is no evidence to support the allegations of the
15 trustee that Burt & Vetterlein used any undue influence upon
16 Stein to enter into the agreements which were entered into;
17 and 3) there is no causation between any of the allegations
18 of breach and the alleged damages.

19 Gordon contends that he is entitled to summary judgment
20 on the trustee's second claim for relief for breach of fidu-
21 ciary duty on the grounds that there is no evidence that he
22 breached any fiduciary duty.

23 The trustee states: "It would seem apparent to any rea-
24 sonable person that when an attorney representing a client
25 obtains the client's only asset for which the client paid
26 \$572,000.00, purchases it at a virtual secret sheriff's sale

1 for \$5,000.00 and, after one year, sells it for \$1,262,690.00,
2 a breach of fiduciary duty would be evident." Trustee's Oppo-
3 sition to Motions for Summary Judgment, p. 25. The trustee
4 argues that the law firm of Burt & Gordon, P.C. breached its
5 fiduciary duty to Stein by misrepresenting facts and by pres-
6 suring Stein to pledge his stock with the threat that it would
7 withdraw as his counsel.

8 The trustee argues that the sheriff's sale was not done
9 in a commercially reasonable manner because notice was not
10 given to an interested public and the price paid by Burt &
11 Vetterlein as a matter of law was unreasonable. The trustee
12 asserts that the true sale of the stock occurred when the law
13 firm of Burt & Vetterlein, P.C. received \$1,262,690 for the
14 stock in In Focus Systems, Inc., and that any proceeds from
15 that sale greater than the debt owed to Burt & Vetterlein
16 should have been returned to Stein for payment to the rest
17 of his creditors.

18 There is no evidence in this case that Burt & Vetterlein
19 used undue influence upon Stein. Further, there is no evi-
20 dence that the sheriff's sale was commercially unreasonable.
21 The trustee's argument for sympathy for other creditors has
22 no basis in law.

23 The court finds that all of the defendants are entitled
24 to summary judgment in their favor on the second claim for
25 relief for breach of fiduciary duty.

26 ///

1 3. Third Claim for Relief - Fraud

2 Burt & Vetterlein contend that they are entitled to an
3 order of summary judgment on the trustee's third claim for
4 relief for fraud because 1) the claim is barred by the applic-
5 able two-year statute of limitations; and 2) the facts alleged
6 by the trustee fail to support a claim for fraud.

7 Gordon contends that he is entitled to summary judgment
8 on the trustee's third claim for relief for fraud on the
9 grounds that there is no evidence that he committed any fraud.

10 The trustee argues that Burt & Vetterlein made misrepre-
11 sentations of material facts to Stein, and that Stein had no
12 right to rely upon them. The trustee argues that the conduct
13 of Burt & Vetterlein supports a conclusion of bad faith from
14 the commencement of their engagement as counsel for Stein.
15 The trustee asserts that Burt & Vetterlein knew that it had
16 been the intent of In Focus Systems, Inc. to have a public
17 offering of its stock from its inception, and that Burt &
18 Vetterlein obtained from Stein assets to which they were not
19 entitled knowing that Stein could offer no resistance to Burt
20 & Vetterlein since he was being investigated by the Federal
21 Bureau of Investigation and the Internal Revenue Service, as
22 well as the State of Oregon and creditors.

23 The elements of fraud are (1) a representation; (2) its
24 falsity; (3) its materiality; (4) the speaker's knowledge of
25 its falsity or ignorance of its truth; (5) the intent that
26 the representation be acted on in a manner reasonably contem-

1 plated; (6) the hearer's ignorance of its falsity; (7) the
2 hearer's reliance on its truth; (8) the hearer's right to
3 rely thereon; and (9) the hearer's consequent and proximate
4 injury. Wilcox v. First Interstate Bank of Or., N.A., 815
5 F.2d 522, 531, n.7 (9th Cir. 1987) (quoting Rice v. McAlister,
6 268 Or. 125, 128, 519 P.2d 1263, 1265 (1974)). Each element
7 of fraud must be proved by clear and convincing evidence.
8 Riley Hill Gen. Contractor, Inc. v. Tandy Corp., 303 Or. 390,
9 407-08, 737 P.2d 595 (1987).

10 The court concludes that the allegations of the trustee
11 are not adequate to make out a claim of fraud, and there is no
12 evidence in the record from which a trier of fact could find
13 the defendants liable to the trustee on a claim for fraud.
14 The court finds that all of the defendants are entitled to
15 summary judgment in their favor on the third claim for relief
16 for fraud.

17
18 4. Fourth Claim for Relief - Tortious Breach of the Duty
19 of Good Faith and Fair Dealing

20 Burt & Vetterlein contend that they are entitled to an
21 order of summary judgment on the trustee's fourth claim for
22 relief for tortious breach of the duty of good faith and fair
23 dealing on the grounds that this claim is no more than a
24 hybrid of a claim for breach of contract under the laws of
25 the State of Oregon, and that there are no facts to support
26 a claim for breach of contract.

Gordon contends that he is entitled to summary judgment

1 on the fourth claim for relief for tortious breach of the
2 implied covenant of good faith and fair dealing because he
3 was not a party to the contract upon which the claim is based.

4 The trustee relies upon Best v. United States Nat'l Bank
5 of Or., 303 Or. 557, 739 P.2d 554 (1987), arguing that Burt
6 & Vetterlein acted in bad faith from the commencement of its
7 provision of legal services.

8 The breach of an implied obligation in Best is based upon
9 a theory of breach of contract. There is no evidence to sup-
10 port the assertion by the trustee here that the bad faith of
11 Burt & Vetterlein was apparent from the commencement of their
12 provision of legal services.

13 The court finds that all of the defendants are entitled
14 to summary judgment in their favor on the fourth claim for
15 relief for the breach of the implied obligation of good faith
16 and fair dealing.

17
18 5. Fifth Claim for Relief - to Vacate Judgment and Set
19 Aside Sheriff's Sale

20 Burt & Vetterlein contend that there are no grounds to
21 set aside the sheriff's sale in that the sale was not obtained
22 by fraud and was a valid sale. Further, Burt & Vetterlein
23 contend that this claim is barred by the doctrine of res judi-
24 cata because Stein moved to have the judgment set aside on
25 the single ground that it was invalid under Rule 73A.(1) of
26 the Oregon Rules of Civil Procedure because Stein neither
resided in Multnomah County, nor was present in Multnomah

1 County at the time of the application to confess judgment.
2 Stein's motion to set aside the judgment was denied, and the
3 denial of that motion is now on appeal in the state courts.

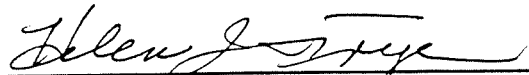
4 The trustee concedes that its fifth claim for relief,
5 as it relates to the matter which was determined on motion by
6 the state court, or could have been determined by the state
7 court, is precluded by the defense of res judicata until such
8 time as it may be reversed on appeal to the appellate courts
9 of the State of Oregon.

10 This court has no grounds upon which to set aside the
11 sheriff's sale. The court finds that all of the defendants
12 are entitled to summary judgment in their favor on the fifth
13 claim for relief to vacate the judgment and set aside the
14 sheriff's sale.

15 CONCLUSION

16 The motion of defendants Burt & Vetterlein, P.C., Robert
17 G. Burt, and Andrea L. Bushnell for summary judgment (#144) is
18 granted. The motion of defendant Mark A. Gordon for summary
19 judgment (#145) is granted.

20 DATED this 9 day of November, 1993.

21 

22 HELEN J. FRYE
23 United States District Judge
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